Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

PETER HALAT JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID A. NICKERSON
Attorney at Law
454 Las Gallinas Ave.
Suite 183
San Rafael, CA 94903
Telephone: (415) 507-9097

Attorneys for Petitioner Peter Halat Jr.

DAVID Z. CHESNOFF
Attorney at Law
GOODMAN, CHESNOFF & KEACH
520 South Fourth Street
Las Vegas, NV 89101
Telephone: (702) 384-5563

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Is due process violated when a federal district court gives a "deliberate ignorance" or "willful blindness" instruction to the jury in relation to alleged conspiracy offenses?

PARTIES TO THE PROCEEDING

In addition to Petitioner Peter Halat Jr., the other parties below included co-defendants at trial in the district court, Sheri LaRa Sharpe, Thomas Leslie Holcomb, Kirksey McCord Nix Jr., and Glenn Joseph Cook. The United States of America, Respondent here, was appellee in the court of appeals and plaintiff in the district court.

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PETITION FOR WRIT OF CERTIORARI

Peter Halat Jr., the petitioner in the above-captioned case, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered on October 20, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was filed on October 20, 1999 and captioned as *United States v. Sheri LaRa Sharpe* (5th Circuit number 97-60263) and *United States v. Sheri LaRa Sharpe; Thomas Leslie Holcomb; Peter Halat Jr.; and Kirksey McCord Nix* (5th Circuit number 97-60704). The opinion was not published. A copy of that opinion appears herein as Appendix "A." A timely petition for rehearing was filed in the Fifth Circuit on November 18, 1999. That petition was denied on December 14, 1999. A copy of the order denying the petition for rehearing appears herein as Appendix B.

JURISDICTION

The federal district court had jurisdiction over Petitioner's case pursuant to 18 U.S.C. section 3231. The Fifth Circuit Court of Appeals had jurisdiction over an appeal from a final judgment of a district court under 28 U.S.C. section 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property without due process of law . . . "

STATEMENT OF THE CASE AND FACTS

A. Procedural History

A fifty-two count indictment was filed on October 22, 1996 in the Southern District of Mississippi. That indictment named Kirksey Nix, LaRa Sharpe, Glenn Cook, Thomas Holcomb and Peter Halat Jr. as defendants. Cook was later found incompetent to stand trial and did not participate in the district court or appellate proceedings. Count One alleged that Nix, Gillich, Sharpe, Cook, Holcomb and Halat conspired to violate the racketeering statute, 18 U.S.C. section 1962(d). Count Two alleged a substantive racketeering offense pursuant to 18 U.S.C. section 1962(c). Counts Three through Eleven concerned only Sharpe. Counts Twelve through Seventeen alleged that Halat obstructed justice. Counts Eighteen through Forty-Nine concerned only Nix. Count Fifty alleged that Nix, Sharpe, Holcomb, Cook and Halat conspired to obstruct justice. Count Fifty-One alleged that Nix and Halat conspired to commit wire fraud. Count Fifty-Two concerned only Nix.

During a seven week jury trial in the Southern District of Mississippi, Count Twelve, an obstruction of justice violation charged against Halat, was dismissed by the court. Following several days of deliberations the jury

found Halat guilty of Count One, conspiracy to violate the racketeering statute, Count 16, obstruction of justice, Count 50, conspiracy to obstruct justice, and Count Fifty-One, conspiracy to commit wire fraud. The jury found Halat not guilty of Count Two, the substantive racketeering offense, and Counts Thirteen, Fourteen, Fifteen, and Seventeen, each charging obstruction of justice.

The district court sentenced Halat to 216 months in federal prison on Count One, the racketeering conspiracy charge. All other sentences were run concurrent to that sentence. Halat appealed to the Fifth Circuit Court of Appeals. That court affirmed both the judgments and sentences entered against Halat.

B. Statement Of The Facts

1. Introduction

As noted above, trial in the district court lasted some seven weeks. To understand Petitioner's contention, that it was improper for the district court to give a deliberate ignorance instruction in relation to the charged conspiracy offenses, a somewhat detailed knowledge of the facts underlying the alleged conspiracies is necessary.

2. The Parties To The Proceedings

Peter Halat was a lawyer and former state court judge in Biloxi, Mississippi. His practice consisted of personal injury, family law, and criminal defense. He also represented the local school board, the Coliseum Commission, and the Chamber of Commerce. In 1980, Vincent Sherry became Halat's law partner and the firm became

Halat and Sherry. Sherry's wife, Margaret, had served on the Biloxi City Council and had unsuccessfully run for mayor of Biloxi in 1985. Halat helped Margaret run for mayor. In 1986, Sherry became a state court judge with Halat's help.

Mike Gillich, the man who would later order Vince Sherry murdered, had coffee with Vince Sherry on a regular basis. Gillich owned and managed a number of strip-joints and nightclubs on the Mississippi Gulf Coast. Gillich had run these clubs for some 30 years. Gillich controlled everything that was illegal on the Coast, including drugs and prostitution. Glenn Cook, an ex-police officer, worked for Gillich. At the time of trial, Gillich was 67 years old. He had already been convicted in early proceedings and sentenced to 15 years in federal prison. In 1992 he was convicted in two separate drug cases and sentenced to an additional 5 years in prison. While serving that 20 year federal sentence, he engaged in obstruction of justice by attempting to pay $20,000 to have a witness change his testimony. When Gillich testified as a government witness against Halat under a grant of immunity he expected that his agreement with the government would result in a reduction of his 20 year sentence to time already served. He expected to be released from custody at the end of Halat's trial.

Gillich was also Kirksey Nix's "little friend." Nix had known Gillich since the early Sixties. In 1979, Nix, who was serving a life sentence at Angola State Prison in Louisiana, contacted Gillich by telephone. Nix was seeking to buy a house on the Coast with money he had inherited. Nix asked Gillich for the name of a good lawyer and real estate agent. Gillich recommended Halat and

Halat's wife, who was a real estate agent. She found a house for Nix and Halat handled the closing. After the closing, the house was rented out. Nix was considered a client of Halat and Sherry. When he spoke to Halat he always indicated that he would send other clients to the firm. In January, 1988, a medical malpractice case was filed in federal court in Biloxi on behalf of the daughter of Nix's wife. Halat acted as local counsel in the case and represented the child in state court proceedings.

LaRa Sharpe arrived on the Gulf Coast from Chicago in 1985. She rented the house Nix owned. She was Nix's girlfriend. She first appeared at Angola Prison in June, 1985, with a letter from a lawyer in Illinois indicating that she was a paralegal. Shortly thereafter she began to work at Halat and Sherry, although she was never a paid employee. She did legal research on a writ Nix wanted to file and was allowed to use the firm's law library. Others in the law firm were relieved when Sharpe arrived because she dealt directly with Nix who was considered a "pest." Sharpe also worked on cases for other inmates at Angola.

3. The Homosexual Scams

Dozens of different scam operations were run by the inmates at Angola State Prison. Nix ran one such scam. A typical victim was Raymond Coble of Kansas. In January 1986, Coble responded by mail to a personal ad in *The Advocate*, a national homosexual magazine, concerning "John." Coble planned to have "John" come live with him. In response to his letter, Coble received a telephone

call from someone claiming to be the head of a correctional center. Coble was told that "John" was in the correctional center, but was due to be released in April. The head of the correctional center asked Coble for money for an airplane ticket so that "John" could go live with Coble. Coble sent $275. After "John" was supposed to have left the correctional center, Coble got another call saying "John" was in "trouble" at the Dallas airport and Coble needed to send bail money or "John" would be returned to the correctional center. Coble sent more money. In all, Coble sent money twenty times to help "John," but "John" never arrived in Kansas.

In fact, there was no "John." The calls Coble received were from Angola inmates, including Nix. The victim would send money to assist "John" by Western Union to various locations. A number of people outside of the prison assisted Nix in picking up the money at Western Union offices. The scam money was given to Gillich who was considered Nix's "banker."

Sharpe's role in the scam was to bring materials, such as paper, pencils and photographs into Angola for Nix. Sharpe would also get the mailed responses to the ad placed in *The Advocate* and mail them to Nix. However, on November 10, 1986, Sharpe was caught entering Angola with a scam related photograph and marijuana in her possession. Her status as a paralegal was revoked by the prison and she never returned to Angola.

Nix claimed to have made hundreds of thousands of dollars through the scam. The money was to be used to get Nix out of prison. In 1981, Nix offered $200,000 to any lawyer who could aid him in getting parole from then-

Governor Edwards of Louisiana. When the governor heard of this offer, he said that Nix's criminal case was so bad that no amount of money would ever get Nix out of prison.

After Nix purchased the house in Mississippi in 1979, it was rented out. Ann Kriss, a secretary at Halat and Sherry, handled the collection of rents and the payment of the mortgage and other bills for the house by using the law firm's client trust account. There was a single Halat and Sherry trust account, but Kriss kept an account ledger for each individual law firm client. Money generated by the rent was placed in the law office trust account. From that trust account Kriss wrote checks to pay the necessary bills. Kriss charged Nix $75 a month for this service. When Nix's trust account funds ran low, Kriss would tell Nix during one of his frequent calls to the law office. Nix would then arrange to have Mike Gillich bring in some money for the account. The total amount of money deposited in the trust account, not just Nix's money, for 1985 was $15,600. For 1986 the total amount deposited in the trust account was $18,300. Some $26,300 was deposited in 1987.

No one testified to giving scam money to Halat. Ann Kriss had absolutely no knowledge about Nix's scam or whether any of the money deposited in the trust account came from the scam.

Halat terminated his relationship with Nix in March, 1988. He had decided that he was going to run for mayor of Biloxi and wanted to limit his law practice. In May, 1988 the F.B.I. informed Halat of Nix's scam activities.

4. The Death Of Vince And Margaret Sherry

In May, 1987, Margaret Sherry indicated to her son that she was going to run for mayor of Biloxi in 1989. She said she would shut down Gillich and his nightclubs if she were elected mayor. Finally, Margaret said that Gillich had put a "contract" out on her and Vince Sherry.

Halat found the bodies of Vince and Margaret Sherry in their Biloxi home on September 16, 1987. He became hysterical upon the discovery. Both Sherrys died as a result of gunshot wounds.

Gillich claimed at trial that he had hired Thomas Holcomb for $20,000 to kill the Sherrys. Gillich said that Vince Sherry was the target and Margaret Sherry "was unlucky enough to be there." Gillich admitted that the murders would not have been committed without his participation, but stated that he did not feel guilty about "killing these people." Gillich also said that he had the Sherrys killed for "personal reasons" and that the murders had nothing to do with Nix's scams. As early as 1985, Gillich complained that Sherry was "bad rapping me and my family and everything . . . I wanted to have him killed . . . " Gillich talked to Glenn Cook about Sherry in April or May, 1987. Cook was also angry at Sherry who had once represented Cook's wife in a personal injury case. Cook "didn't like the way he did all of that." Cook agreed that Sherry needed to be killed and offered to do it for $10,000. Gillich gave Cook a pistol equipped with a silencer to kill Sherry, but Cook returned the gun to Gillich about a month later.

The government argued at trial that Nix wanted Sherry killed because of missing scam money. According to Gillich, around Christmas 1986, Halat came to one of Gillich's nightclubs to talk about Nix. According to Gillich, Halat said he had a problem; $100,000 of Nix's scam money was missing. Halat said the money had been stashed in his law office and the only other person who knew about it was Sherry. Halat said he didn't take the money. Sherry told Halat that he didn't take the money either.

Gillich testified that he and Halat had to go to Angola and tell Nix. Halat and Gillich drove to Angola the next day. Gillich was not admitted into the prison, however, because he was not on Nix's visitor list. When Halat came out of the prison he said that Nix was "hot" about the missing money and that he was "going to do someone in" if he didn't get his money back. A few days later, Nix and Gillich talked by telephone. Gillich told Nix that Sherry probably took the missing money.

In May or June 1987, Nix called Gillich again. He asked Gillich if he still wanted "to do that to Vince" Sherry. Gillich said he did. Nix said he "was ready to move on him. Don't look like I'm going to get my money back." According to Gillich, this telephone call from Nix put into motion the plan to kill Sherry.

In July, 1987, Tom Holcomb came to Biloxi from Texas. Gillich had Cook ask Holcomb about killing the Sherrys. Holcomb said he was not interested.

According to Gillich, in August, Nix told Gillich he was sending someone to talk to Gillich about doing "the

number." Robert Hallal arrived and spoke to Gillich. However, Hallal wasn't interested in the contract either.

According to Gillich, Holcomb returned to Biloxi in August. This time he indicated he would do the murders for $20,000, half of the fee before and half after the job was finished. Gillich claimed he paid him. However, Holcomb returned to Texas to take care of some business. Holcomb returned to Biloxi on a Friday or Saturday in early September. Gillich had made arrangements for him to stay at the house next to Lenny Swetman's house. Gillich also gave Holcomb a pistol and some bullets. He test fired the gun in the house and stuffed foam rubber into the silencer.

On Monday night, Swetman went to a used car lot with Cook and stole a yellow Ford for Holcomb to use during the murders. That same night, Gillich claimed he drove Cook out to the Sherry's house and pointed out the house. Later, Cook came back to the club and told Gillich that Holcomb was on his way.

The next morning, Tuesday, Gillich was at the donut shop. Cook came by. Gillich claimed that after making a call on a payphone, Cook told him that the Sherrys were dead. Cook reported that Holcomb said he "did" both of them and "I throw her in for free." The bodies were discovered in the Sherry home by Halat on Wednesday, September 16th.

Besides the account of the murder based upon Gillich's testimony, the government also presented the testimony of Bill Rhodes at trial. His testimony was completely at odds with Gillich's version of the murders.

In January 1987, Bill Rhodes was asked by John Ransom to assist him in a "contract" to kill a judge. According to the Ransom, the judge was holding some money for someone, but ripped them off. Rhodes further claimed that he was told separately by Halat that Vince Sherry "had screwed them out of $750,000" that Sherry was supposed to be holding. According to Rhodes, Halat also said that "they" were under investigation and that Vince Sherry was the "weak link."

A few weeks later, in February 1987, Ransom and Rhodes drove to Biloxi and met with a man Rhodes claimed was Halat. Ransom, Rhodes and Halat drove around in a Mercedes while Halat discussed a $50,000 contract to kill a judge.

Two weeks later, Ransom and Rhodes returned to Biloxi. Rhodes again claimed he met with Halat. Ransom told Rhodes that there was $750,000 in the judge's house. He wanted Rhodes to be the "wheelman" while he killed the judge and his wife. Rhodes said he would think about it. When Rhodes got ready to leave, Ransom said there was somebody else he wanted Rhodes to meet. They drove to a donut shop in Biloxi and met Gillich. Rhodes knew who Gillich was, that he was connected to the Dixie-mafia, and that he controlled all illegal activity on the Gulf Coast. Gillich told Rhodes that he would personally give them the money for the murders. He told Rhodes that he would rent a hotel room in Gulfport and get a "clean" car for them to use when the murders were committed. The payment for the murders would be in the hotel room. Rhodes said he would think about it. Gillich indicated that there was not much time left. However,

Gillich testified at trial that he did not know Rhodes and had never met him.

Rhodes returned to Atlanta. He was arrested in March 1987, for a bank robbery. When he was released in November 1987, after the Sherrys were murdered, he again met Ransom in Atlanta. Ransom told Rhodes that *he* had carried out the contract to murder the Sherrys and that Rhodes had better keep his mouth shut.

In September, 1987, a week or two before the murders, Chuck Leger, a lawyer and associate at Halat and Sherry, was leaving the law office when he encountered a man walking across the parking lot. Leger described the man as "imposing" and "threatening." The man asked Leger where he could find Judge Vincent Sherry. Leger told the man to check the courthouse in Gulfport. Leger later identified the man he saw in the parking lot as Ransom.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted So That This Court Can Settle A Conflict Among The Federal Courts Of Appeal: Is It Proper To Give A Willful Blindness Instruction In Relation To A Conspiracy Offense?

A. Introduction

Due process requires that the government must prove beyond a reasonable doubt every fact necessary to constitute the charged crime. *In Re Winship*, 397 U.S. 358, 364 (1970). At trial the district court in this case instructed the jury that it could find a defendant had knowledge of a fact if the defendant had "deliberately closed his eyes to

what would otherwise have been obvious to him." Such an instruction is known as a "willful blindness," "deliberate ignorance," "conscious avoidance," or "ostrich" instruction. Herein, it shall be referred to as a "willful blindness" instruction.

A willful blindness instruction in general is not objectionable, if there is a factual foundation for it. However, some Circuit Courts of Appeal, notably the Second Circuit, have expressly ruled that a willful blindness instruction is fundamentally incompatible with proof that a defendant knowingly joined a conspiracy. That is, it relieves the government of the burden of proving beyond a reasonable doubt that the defendant knowingly joined the conspiracy by substituting "willful blindness" for actual knowledge. On the other hand, several other circuits, notably the Seventh Circuit and in this case the Fifth Circuit, have ruled that a willful blindness instruction is not incompatible with the elements of a conspiracy offense. This split of opinion among the Circuit Courts of Appeal compels that this Court grant certiorari in this case in order to resolve this issue. Those circuits which permit a conspiracy conviction based on willful blindness are, in each case, depriving the defendant of due process.

B. Procedural Background

In relation to Count One of the indictment, the racketeering conspiracy, the district court instructed the jury that in order to convict a defendant of the charged conspiracy it had to find "that the defendant deliberately

joined or became a member of the conspiracy or agreement with knowledge of its purposes . . . and . . . unlawfully, willfully and knowingly conspired with at least one other person by agreeing that someone . . . would commit at least two of the racketeering acts . . . " Similarly, concerning the conspiracy to obstruct justice alleged in Count Fifty of the indictment and the conspiracy to commit wire fraud alleged in Count Fifty-One of the indictment, the district court instructed the jury: "If a defendant understands the unlawful nature of the plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy . . . " These instructions clearly indicated to the jury that there are two *mens rea* elements to a conspiracy offense. First, the conspirator must know that a conspiracy exists and knowingly join that conspiracy. Second, the conspirator must have some knowledge of the objectives of the conspiracy. The government had to prove beyond a reasonable doubt each element of knowledge before the jury could find a defendant guilty of the charged conspiracy.

Additionally, the district court gave the following willful blindness jury instruction over Halat's objection:

> Now, the word "knowingly," as the term has been used from time to time in these instructions, means that an act was done voluntarily and intentionally, not because of mistake or accident.
>
> You may find that a defendant had knowledge of a fact if you find that defendant deliberately closed his eyes to what would otherwise have been obvious to him. Mere knowledge on the

> part of a defendant cannot be established merely by demonstrating that the defendant was negligent, careless or foolish as soon as knowledge can be inferred if the defendant blinded himself to the existence of a fact.

The government also made specific reference to the willful blindness instruction in its closing argument. The government argued:

> Mr. Chesnoff (defense counsel) says that Peter Halat did not know about the scam . . . Now that's what the Judge is talking about when he says knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact. Do you think Peter Halat – do you think Peter Halat thought that Kirksey Nix was sending Christmas cards with those hundreds of dollar's worth of stamps that they were getting to him every month?

In his motion for new trial Halat argued that it was error to give a willful blindness instruction in a conspiracy case. The district court rejected that argument. On appeal before the Fifth Circuit, Halat, citing authority for several other circuits, argued that it was error to give a willful blindness instruction in relation to any of the three charged conspiracy offenses in this case. The Fifth Circuit Court rejected that argument. Without even acknowledging the authority from several other circuits that it is error to instruct on willful blindness in relation to a conspiracy offense, the Fifth Circuit noted only that it had approved of such instructions in the past. (Appendix A, p. 32.) However, in none of the cases cited by the Fifth Circuit as having approved of a willful blindness instruction had the defendant claimed that such an instruction is

fundamentally incompatible with the elements of a conspiracy offense.

C. The Courts Of Appeals Are Split On This Issue: Is It Proper To Give A Willful Blindness Instruction In Relation To Conspiracy Offenses?

A willful blindness instruction is premised on the belief "that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient *mens rea* for an offense based on such words as 'knowingly.' " *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (*en banc*).[1] The purpose then of a willful blindness instruction is "to alert the jury to the fact that the act of avoidance of knowledge of particular facts may itself circumstantially show the avoidance was motivated by sufficient guilty knowledge to satisfy the statute." *United States v. Manriquez*, 833 F.2d 244, 248 (10th Cir. 1987).

As noted above, in this case Count One, Count Fifty, and Count Fifty-One each alleged a conspiracy offense. As such, the government had to prove, and the jury had to find beyond a reasonable doubt, that each defendant *knew* that a conspiracy existed and knowingly joined that

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[1] Then Circuit Court Judge, now Supreme Court Justice, Kennedy dissented from the *en banc* opinion in *Jewell*. Justice Kennedy found that "the conscious purpose instruction in this case . . . falls short of the scienter independently required under both counts." *United States v. Jewell, supra*, 532 F.2d at 705 (J. Kennedy dis.). At issue in *Jewell* were drug possession and importation offenses. Clearly if Justice Kennedy would not approve of a willful blindness instruction in relation to those offenses he would not approve of such an instruction in relation to a conspiracy offense.

conspiracy. *United States v. Garcia-Pena*, 743 F.2d 1463, 1464 (11th Cir. 1984): in order to convict a defendant of a conspiracy, the government must prove beyond a reasonable doubt "that these (defendants) had deliberate, knowing, specific intent to join the conspiracy." (Internal quotations deleted.) Additionally, the government had to prove and the jury had to find that each defendant had some knowledge of the conspiracy's objectives. *United States v. Lanza*, 790 F.2d 1015, 1022 (2nd Cir. 1986).

The question then arises: Can a defendant knowingly join a conspiracy he does not actually know exists? The Courts of Appeal have answered this question in two different ways.

The Second Circuit, in a series of cases, has clearly held that it is error to give a willful blindness instruction in relation to the issue of a defendant's knowing participation in a conspiracy, but not in relation to the issue of knowledge of the conspiracy's aims or objectives. *United States v. Scotti*, 47 F.3d 1237, 1243 (2nd Cir. 1995); *United States v. Fletcher*, 928 F.2d 495, 502-503 (2nd Cir. 1991); *United States v. Lanza, supra*, 790 F.2d at 1022-1023; *United States v. Mankani*, 738 F.2d 538, 547 fn. 1 (2nd Cir. 1984). In *Scotti*, the court stated: "The reason that we do not permit conscious avoidance instructions on the issue of knowing participation in a conspiracy is that it is logically impossible for a defendant to intend to agree to join a conspiracy if he does not know that it exists." *United States v. Scotti, supra*, 47 F.3d at 1243. *Scotti* cited to an earlier Second Circuit opinion, *United States v. Mankani, supra*, 738 F.2d at 547 in which the Second Circuit stated: "How can a person consciously *avoid* participating in a conspiracy and also be a member of the conspiracy? The two notions

are obviously mutually exclusive." (Emphasis in original.) The Sixth Circuit has expressly adopted the reasoning of the Second Circuit. In *United States v. Warshawsky*, 20 F.3d 204, 211 (6th Cir. 1994) the Sixth Circuit cited the Second Circuit opinion in *United States v. Mankani, supra*, 738 F.2d 547 and stated:

> Under *Mankani* the existence of an agreement or the entry into a conspiracy may not be proved by deliberate ignorance. However, *Mankani*, does not apply when deliberate ignorance is used only to establish knowledge of the unlawful aims of a conspiracy . . . the deliberate ignorance instruction was offered to prove their knowledge of the aims of the conspiracy, not to prove the existence of an agreement.

The First Circuit has also adopted the reasoning of the Second Circuit and held that a "willful blindness instruction" should be "aimed" only at substantive counts and not be made applicable to a racketeering conspiracy. Additionally, the First Circuit held that the district court should give a "cautionary instruction" to ensure that the defendants must have joined the racketeering conspiracy intentionally. *United States v. Hurley*, 63 F.3d 1, 10 (1st Cir. 1995).

In contrast, the Seventh Circuit has stated that its position on this issue was directly "contrary to the precedent of the Second Circuit" and "that such an instruction is permissible with respect to a conspiracy charge." *United States v. Diaz*, 864 F.2d 544, 549 (7th Cir. 1988) citing *United States v. Kehm*, 799 F.2d 354 (7th Cir. 1986). Other courts have also rejected the Second Circuit's authority on this point. In *United States v. Nesser*, 939

F.Supp. 417, 419-420 (W.D. Penn. 1996) the district court, citing *Scotti*, *Lanza*, and *Mankani*, found the Second Circuit's reasoning "flawed" and "not . . . persuasive."

Additionally, at least one commentator has expressly noted the split among the Courts of Appeal. However, that commentator found the Second Circuit's reasoning compelling and rejected the position taken by the Seventh Circuit.

> The Second Circuit approach is logically consistent. This approach is also in accord with the Model Penal Code, which is the source for the conscious avoidance theory, and the instructions based upon that theory. More importantly, the Second Circuit approach is in accord with the common law, from which federal conspiracy statutes are derived.
>
> Chini, *Criminal Law – Whose Head Is In The Sand? Problems With The Use Of The Ostrich Instruction In Conspiracy Cases*, 13 W. New England. L. Rev. 35, 61 (1991) (footnotes deleted).

Courts of Appeal, such as the Fifth Circuit in this case, which permit a willful blindness instruction in a conspiracy case, have either failed to recognize the distinction made by the Second Circuit between knowledge of the aims of the conspiracy and knowing and intentional participation in the conspiracy or found that under the facts of the particular case at hand the willful blindness instruction was applicable only to the issue of the defendant's knowledge of the aims of the conspiracy. See e.g. *United States v. Soto-Silva*, 129 F.3d 340, 345 (5th Cir. 1997); *United States v. Moser*, 123 F.2d 813, 825 (5th Cir. 1997); *United States v. Fierro*, 38 F.3d 761, 772 (5th Cir.

1994); *United States v. Faulkner*, 17 F.3d 745, 765 (5th Cir. 1994). These Court of Appeal opinions have never directly confronted the propriety of such an instruction when the defendant asserts that he did not know the existence of the conspiracy and/or knowingly join the conspiracy.

Circuits which permit a willful blindness instruction in relation to a conspiracy offense are allowing juries to convict a defendant without proof beyond a reasonable doubt that the defendant knowingly joined the conspiracy. The instant case is a perfect example of that due process violation. No evidence was introduced at trial that Halat actually knew of the homosexual scams being perpetrated by Nix, Gillich and Sharpe. Instead, the government argued that Halat, a lawyer and former judge, *should* have known that the money from Nix going into the office trust account could have only come from illegal activity. Thus, the government expressly argued, and the jury was expressly instructed, that Halat could be found guilty of each of the three alleged conspiracy offenses if the jury found he did not actually know of the scams, but had willfully avoided knowing about the scams. Pursuant to the government's theory and the district court's instructions, Halat was convicted of the conspiracy offenses, not because he knew of each alleged conspiracy and knowingly joined each conspiracy, but because he *should have known* of each conspiracy. That the willful blindness instruction made the difference is evidence by the fact that Halat was convicted of the racketeering conspiracy but found not guilty of the substantive racketeering offense which was based on the exact same racketeering acts.

D. Conclusion

In some circuits, notably the Fifth and the Seventh, a defendant may be convicted of a conspiracy offense even if he did not actually know the conspiracy existed. These circuits permit convictions for conspiracy offenses based upon willful blindness. Other circuits, notably the First, Second, and Sixth, do not permit conspiracy convictions without proof beyond a reasonable doubt that the defendant knowingly joined a conspiracy. If Halat had been charged with the conspiracy offenses at issue here in the Second Circuit, no willful blindness instruction would have been given and he would not have been convicted of those conspiracy offenses. Pursuant to Rule 10(a) of the *Rules of the Supreme Court*, this Court should grant certiorari in this case to resolve this important issue of federal law.

CONCLUSION

For the foregoing reasons, the instant Petition for a Writ of Certiorari should be granted and this Court should rule that due process is violated whenever a trial court gives a willful blindness jury instruction in relation to a conspiracy offense.

Dated: March 5, 2000

Respectfully submitted,

DAVID Z. CHESNOFF
Attorney at Law
GOODMAN, CHESNOFF & KEACH
520 South Fourth Street
Las Vegas, Nevada 89101

DAVID A. NICKERSON
Attorney at Law
454 Las Gallinas Ave.
Suite 183
San Rafael, California 94903

Attorneys for Petitioner
Peter Halat Jr.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-60263

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SHERI LARA SHARPE,

Defendant-Appellant.

No. 97-60704

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SHERI LARA SHARPE; THOMAS LESLIE HOLCOMB; PETER HALAT, JR.; AND KIRKSEY MCCORD NIX, JR., also known as J R, also known as Junior, also known as Kirk,

Defendants-Appellants.

Appeals from the United States District Court
For the Southern District of Mississippi

(Filed Oct. 20, 1999)

Before POLITZ, JOLLY and DUHÉ, Circuit Judges.

DUHÉ, Circuit Judge:

In this criminal appeal, we examine once again the sordid tale of Kirksey McCord Nix's ("Nix") prison-based criminal empire and the related murders of Vincent and Margaret Sherry. We first examined these events in *United States v. Sharpe*, 995 F.2d 49 (5th Cir. 1993) ("*Sharpe I*"). Since *Sharpe I* new facts have come to light implicating Thomas Leslie Holcomb ("Holcomb") and Peter Halat, Jr. ("Halat") in the Sherrys' murder. As a result of this new information a grand jury issued a fifty-two count indictment against Nix, Holcomb, Halat, and Sheri LaRa Sharpe ("Sharpe"). Following a new trial ("*Sharpe II*"), Nix and Sharpe were again convicted. Additionally, the jury convicted both Holcomb and Halat for their respective roles in this affair.

I. BACKGROUND

SHARPE I

While serving a life sentence for murder at Angola State Penitentiary, Nix built a criminal empire from which he hoped to earn enough money to buy his way out of prison. Although he dabbled in insurance fraud and drug dealing, Nix's primary money-making scheme was a "lonely hearts" scam designed to defraud homosexual men. Nix and his prison syndicate would place personal advertisements in national homosexual magazines. When men would respond to these ads, Nix or one of his associates would indicate that he was having financial difficulties and needed the respondent to wire money to a

Nix associate outside prison. Nix acquired hundreds of thousands of dollars from this scam.

Mike Gillich ("Gillich"), the alleged "underworld boss" of Biloxi, Mississippi, aided Nix in his various schemes. Peter Halat, a Biloxi attorney, maintained a trust account for Nix. Nix's girlfriend, LaRa Sharpe also assisted in the schemes. She worked out of Halat's office and along with Halat rented a safety deposit box in which they kept cash generated by Nix's operations.

In December 1986, Halat told Nix and Gillich that approximately $100,000 of Nix's money was missing from the office trust account. Halat indicated that he suspected Vincent Sherry, Halat's former law partner and a Mississippi Circuit Judge, of stealing the money. Coincidentally, Judge Sherry's wife Margaret was a Biloxi mayoral candidate critical of Gillich's operations. The prosecution produced evidence that the three men arranged to have the Sherrys killed. In September 1987 Halat discovered the Sherrys dead in their home.

At the first trial for fraud and the attendant murders in 1991, the government argued that Nix, with the assistance of Sharpe, Sharpe's mother, and Gillich, hired ex-convict John Ransom ("Ransom") to kill the Sherrys. Bill Rhodes ("Rhodes"), an associate of Ransom's, testified that Gillich had discussed with him and Rhodes a possible contract murder. Rhodes testified further that he was out of town during the murders and that later Ransom told him that he had murdered the Sherrys. At the first trial, Gillich insisted that Halat had nothing to do with the homosexual scam or the murders. As a result, the government did not prosecute Halat. The jury convicted

Nix, Gillich, Sharpe, and Ransom of wire fraud and conspiracy to commit wire fraud. The jury also found Nix and Gillich guilty of travel in aid of murder-for-hire. We affirmed these convictions in *Sharpe I*, 995 F.2d 49 (5th Cir. 1993).

SHARPE II

Nix continued his schemes from jail after the 1991 trial. The government also continued its investigation into the scam and murders. This time, the government concentrated its efforts on determining what role Halat, by then the Mayor of Biloxi, played in the crimes. In 1994 Mike Gillich turned state's evidence in exchange for a reduction of his *Sharpe I* sentence. Gillich admitted that Halat was involved in the scams and the murders. Moreover, Gillich indicated that it was not Ransom who had murdered the Sherrys[1]; but, rather, Thomas Holcomb, a contract killer hired by Gillich. While the government was procuring Gillich's testimony, it was negotiating with Robert Wright ("Wright") for his testimony concerning a number of drug deals that he had engaged in with Nix and his associates. In the end, the government granted Wright full immunity for his testimony.

As a result of its further investigations and Gillich's testimony, the government brought a new indictment against Nix, Sharpe, Halat, and Holcomb in 1996. The indictment charged Nix with racketeering, conspiracy to

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[1] Gillich insisted that Ransom was involved in the planning of the murders, but did not actually kill the Sherrys.

violate the racketeering statute, fraud, conspiracy to commit wire fraud, money laundering, and conspiracy to obstruct justice. It charged Sharpe with obstruction of justice and conspiracy to obstruct justice for false testimony she gave in the 1991 trial. It charged Halat with obstruction of justice, conspiracy to obstruct justice based on false statements made during the 1991 investigation and trial testimony, conspiracy to violate the racketeering statute, racketeering, and conspiracy to commit wire fraud. Finally, the indictment charged Holcomb with conspiracy to violate the racketeering statute and conspiracy to obstruct justice.

After a lengthy trial, the jury began deliberations on July 11, 1997. During deliberations some of the jurors complained that one of the jurors was making inappropriate sexual remarks and was refusing to participate in the deliberative process. The judge overruled a defense motion for a mistrial and investigated the alleged juror misconduct. Satisfied with his investigation of the matter, the trial judge sent the jurors back for further deliberations. On July 16, 1997 the jury rendered a partial guilty verdict on all of the charges against Nix, Sharpe, and Holcomb and Halat's obstruction of justice and conspiracy to obstruct justice charges. The judge gave the jury an *Allen* charge and instructed them to continue deliberating on the charges remaining against Halat. On July 17, 1997 the jury found Halat guilty of conspiracy to commit wire fraud and conspiracy to violate the racketeering statute. Each defendant now challenges his or her convictions on multiple grounds.

II. ISSUES RAISED BY MULTIPLE DEFENDANTS

A. Motion for Mistrial Based on Jury Misconduct

After three days of jury deliberation, the court advised the parties that it had received several complaints concerning conduct of juror number six. When a juror complained to the marshal, the marshal instructed the juror to put his complaints in writing for the court. The complaints alleged that juror number six used lewd and sexually explicit language towards other jurors, made sexually explicit comments about trial participants, behaved rudely, and made his decision based on factors outside of the evidence. The court, in the presence of the lawyers and defendants, questioned each juror individually, asking each to specify any incidents of sexual misconduct, intimidation, or the interjection of extrinsic factors into the deliberative process by juror number six. After the individual inquiries, the judge recalled all the jurors to the courtroom, and urged them to consider the evidence, to deliberate, and to act civilly. Finally, the judge polled the jurors, asking each if they could be impartial, fair, follow the court's instructions, and base their verdict only on the evidence and the law. Each juror responded affirmatively.

The defendants several times objected unsuccessfully to the judge questioning the jurors, recommending instead that the judge respond in writing instructing the jury to follow the court's instructions. The government several times moved unsuccessfully to remove juror number six.

The defendants contend that juror misconduct directly impacting the deliberative process warranted a

mistrial.[2] We review a district court's decision to hold a hearing to determine whether juror misconduct has occurred for abuse of discretion. *See United States v. Chiantese*, 582 F.2d 974, 978 (5th Cir. 1978). The district court did not abuse its discretion in investigating complaints of sexual harassment, intimidation, and reliance on extrinsic evidence. In addition, the record does not show that questioning the jurors in any way impacted the deliberative process. On the contrary, Judge Pickering proceeded in a very careful and conscientious manner. He prefaced each inquiry by reminding the jurors that they were the ultimate judges of fact and that they should not be influenced by anything he said or did. He also warned the jurors not to reveal the details of the deliberative process in their responses. Finally, he consulted with the lawyers throughout, giving thoughtful consideration to their suggestions.

B. Sharpe's and Holcomb's Motion for Severance

The district court denied Sharpe's and Holcomb's motion to sever. Sharpe asserts that she suffered specific and compelling prejudice from being tried jointly with Nix and Holcomb. Sharpe contends that: she was the only defendant not indicted on the drug conspiracy charge which was the primary focus at trial; she was not charged with murder or conspiracy to murder the Sherrys; and

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[2] The defendants jointly moved for a mistrial prior to the district court individually questioning the jurors, and Sharpe again moved for mistrial when, at the end of the district court's questioning, the district court did not remove any jurors.

evidence with no relevance to charges against Sharpe predominated at trial.

Holcomb contends that the government did not have adequate evidence to convict him as the trigger man, so it used the RICO conspiracy charges and voluminous evidence unrelated to him to hold him guilty by association. Holcomb also contends that his right to a fair trial was similarly prejudiced because he was tried with Nix and Sharpe, both of whom previously had been tried and convicted. He also complains he was denied the use of exculpatory evidence by his co-conspirators, and his motions for a separate trial were denied without a limiting instruction to the jury to consider only the evidence against him.

We review a district court's denial of severance for abuse of discretion. *See United States v. Hare*, 150 F.3d 419, 426 (5th Cir. 1998). A defendant must show "specific and compelling prejudice against which the district court could not provide adequate protection, and that this prejudice resulted in an unfair trial." *See United States v. Mitchell*, 31 F.3d 271, 276 (5th Cir. 1994) (citations omitted).

Sharpe's list of witnesses who made no reference to Sharpe and her assertion that charges against her were peripheral to the primary focus of the trial do not amount to specific and compelling proof of prejudice. Furthermore, neither do Holcomb's allegations of prejudice regarding guilt by association, the denial of exculpatory evidence and the lack of limiting instructions to the jury.

C. Government Testimony Violating 18 U.S.C. § 201(c)(2)

All four defendants assert that Gillich's and Wright's testimony should have been suppressed, because the government criminally bribed them to testify as government witnesses. The government agreed to reduce Gillich's twenty-year prison sentence for a prior conviction to time served, to dismiss bribery charges against Gillich and others, and to refrain from indicting Gillich's daughter and son-in-law. The government granted Wright complete immunity. 18 U.S.C. § 201(c)(2) creates criminal penalties for bribing witnesses, and defines bribery as "[d]irectly or indirectly, giv[ing], offer[ing], or promis[ing] anything of value to any person, for or because of the testimony under oath . . . given or to be given . . . as a witness upon a trial. . . . " The defendants note that the government has given Gillich and Wright something of value, namely freedom, because of their testimony against the defendants in this trial.

We review the bribery issue for plain error, since the defendants failed to object at trial. *See United States v. Haese*, 162 F.3d 359, 366 (1998). This argument is foreclosed by our authority that Section 201(c)(2) does not apply to government plea bargains in exchange for testimony. *See id.* at 367-68.

III. SHERI LARA SHARPE

A. Motion to Dismiss the Indictment

In 1991, the government indicted Sharpe for and a jury convicted her of conspiracy to commit wire fraud

and conspiracy to commit murder-for-hire. In 1996, the government indicted Sharpe for and a jury convicted her of seven counts of obstruction of justice[3] and one count of conspiracy to obstruct justice. Sharpe moved to dismiss the indictment, asserting that: (1) Double Jeopardy barred her prosecution; (2) the substantive obstruction of justice charges failed to state a claim under 18 U.S.C. § 1503; and (3) were multiplicious.

1. Double Jeopardy

Sharpe argues that Count I[4] of the 1991 indictment covered both the 1996 substantive obstruction of justice charges and the conspiracy to obstruct justice charge.

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[3] The substantive obstruction counts arise from separate portions of Sharpe's testimony at the 1991 trial. Count 3 involves Sharpe's testimony that she never made a three-way call to any victim of the homosexual scam. Count 4 involves Sharpe's testimony that she did not participate in the homosexual scam after Easter of 1986. Count 5 involves Sharpe's testimony that she never delivered money to Gillich. Count 7 involves Sharpe's testimony that she did not use legal materials in Halat's and Sherry's office to enhance participation in the homosexual scheme. Count 8 involves Sharpe's testimony that she had never possessed a silencer. Count 10 involves Sharpe's testimony that she never discussed the scam with Gillich. Count 11 involves Sharpe's testimony that Halat had no knowledge of the homosexual scam.

[4] Count I charged Sharpe with conspiracy to commit wire fraud and conspiracy to commit murder-for-hire, and stated that "[i]t was . . . part of the conspiracy that the co-defendants, co-conspirators and confederates cover up and conceal the objectives of the conspiracy and their involvement therein." Count I cited Sharpe's receipt of scam money from a Nix confederate in January and February 1986 as an overt act.

A subsequent prosecution avoids the Double Jeopardy bar by satisfying the *Blockburger* same-elements test.[5] *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *See also United States v. Dixon*, 509 U.S. 688, 697, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). Under the *Blockburger* test, each offense must contain an element not contained in the other; if not, they are the same offense within the Clauses' meaning and double jeopardy bars subsequent punishment or prosecution. *Id.* at 688.

The elements of a Section 371 conspiracy are: (1) an agreement between the defendant and one or more other persons to violate a law of the United States; (2) an overt act by one of the conspirators in furtherance of the conspiracy; and (3) the defendant's intent to further an unlawful objective of the conspiracy. *See* 18 U.S.C.A. § 371 (West 1984); *United States v. Razo-Leora*, 961 F.2d 1140, 1144 (5th Cir. 1992). The relevant "laws of the United States" for the purpose of the 1991 indictment were murder-for-hire[6] and wire

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[5] The Supreme Court developed the *Blockburger* test, a rule of statutory construction triggered when the same conduct violates more than one statutory provision. *See Garrett v. United States*, 471 U.S. 773, 778-79, 105 S.Ct. 2407, 85 L.Ed.2d (1985). The Court noted that "[i]nsofar as the question is one of legislative intent, the *Blockburger* presumption must of course yield to a plainly expressed contrary view on the part of Congress." *Id.* at 779.

[6] The elements of murder to hire are: (1) traveling or causing another to travel in interstate or foreign commerce, or using or causing another to use the mail or other facility of interstate or foreign commerce; (2) with intent that a murder be committed in violation of the laws of any State or the United

fraud.[7] The elements of obstruction of justice are: (1) a judicial proceeding was pending; (2) the defendant knew of the judicial proceeding; and (3) the defendant acted corruptly with the specific intent to influence, obstruct, or impede that proceeding in its due administration of justice. *See* 18 U.S.C.A. § 1503 (West 1984).

Double Jeopardy does not bar the 1996 substantive obstruction counts, because they survive the *Blockburger* test. Regarding the *Blockburger* test, obstruction of justice requires specific intent to obstruct justice and conspiracy does not, while conspiracy requires an agreement between two or more people and obstruction of justice does not.

The 1996 conspiracy to obstruct justice count also survives the *Blockburger* test. Regarding the *Blockburger* test, the 1991 conspiracy count required an agreement to further the wire fraud and murder-for-hire schemes, while the 1996 conspiracy count did not; the 1996 conspiracy count required an agreement to further the obstruction of justice scheme, while the 1991 conspiracy count did not.

The parties vigorously disputed in brief and at oral argument whether one or two conspiracies existed for

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States; and (3) as consideration for the receipt of pecuniary value. *See* 18 U.S.C.A. § 1958 (West Supp. 1998).

[7] The elements of wire fraud are: (1) the defendant knowingly participated in a scheme to defraud; (2) use of interstate wire communications to further the scheme; and (3) the defendant intended some harm to result from the scheme. *See* 18 U.S.C.A. § 1343 (West 1984); *United States v. Powers*, 168 F.3d 741, 746 (5th Cir. 1999).

Double Jeopardy purposes. We need not resolve this issue, since even if only one conspiracy existed, "a person's participation in a conspiracy ends when that person is arrested for his role in the conspiracy. . . . '[F]urther [participation in an] old conspiracy after being charged with that crime becomes a new offense for purposes of a Double Jeopardy claim.' " *United States v. Dunn*, 775 F.2d 604, 607 (5th Cir. 1985) (internal citations and quotes omitted). Sharpe's false testimony occurred during the wire fraud and murder-for-hire trial, after she was arrested for conspiracy to commit wire fraud and murder-for-hire. Thus, even assuming one conspiracy, further participating in that conspiracy by falsely testifying constituted a new offense for Double Jeopardy purposes. Although the conversation with her confederate occurred before the 1991 indictment, the government did not prosecute Sharpe for that conversation. *See United States v. Felix*, 503 U.S. at 387.

2. Failure to State a Claim Under 18 U.S.C. § 1503

Sharpe argues that, as a matter of law, perjury at trial alone does not obstruct the clear administration of justice. Therefore, the indictment failed to state a violation of 18 U.S.C. § 1503 and should be dismissed. We disagree. "[W]e defined the statutory term 'administration of justice' as 'the performance of acts required by law in the discharge of duties such as appearing as a witness and giving truthful testimony when subpoenaed.' . . . The perjurious witness can bring about a miscarriage of justice by imperiling the innocent or delaying the punishment of the guilty." *United States v. Griffin*, 589 F.2d 200,

203 n.4, 204 (5th Cir. 1979). Sharpe's efforts to distinguish false testimony at trial from the false testimony at a grand jury proceeding in *Griffin* are not persuasive, since false testimony in either venue may "imperil[ ] the innocent or delay[ ] the punishment of the guilty." *Id.* at 204.

Alternatively, Sharpe challenges the sufficiency of the evidence of her specific intent to impede the administration of justice. We review a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the verdict. We affirm if a rational trier of fact could have found all essential elements of the crime beyond a reasonable doubt. *United States v. Sultan*, 115 F.3d 321, 324 (1997). Under Section 1503, an act with the "natural and probable effect" of interfering with the due administration of justice satisfies the intent requirement for obstruction of justice. *United States v. Aguilar*, 515 U.S. 592, 599, 115 S.Ct. 2357, 132 L.Ed.2d 2357 (1995). This record makes clear that a reasonable jury could have found that Sharpe's false testimony concerning Gillich's, Halat's, and her own involvement in the wire fraud and murder-for-hire scheme had the natural and probable effect of interfering with the due administration of justice.

3. Multiplicious Substantive Obstruction of Justice Charges

Sharpe asserts that the seven false responses cited in the indictment were not separate, distinct acts. They were part of a continuous scheme or transaction, evidenced by the responses all being given during the same trial, on the same day, and, according to the government, all for the

purpose of covering up the wire fraud and murder conspiracies. Therefore, they could support only one charge.

Charging a single offense under more than one count of an indictment is multiplicious and raises the Double Jeopardy specter of multiple punishments. *See United States v. Soape*, 169 F.3d 257, 266 (5th Cir. 1999). But an obstruction of justice indictment is not multiplicious when it contains charges for separate and distinct acts of perjury, even if the acts are all related and arise out of the same transaction or subject matter, if they require different factual proof of falsity. *See United States v. Harrelson*, 754 F.2d 1182, 1184 (5th Cir. 1985) (noting separate perjury charges for separate false declarations are not multiplicious); *United States v. DeLaTorre*, 634 F.2d 792, 795 (5th Cir. 1981) (same); *United States v. Nixon*, 634 F.2d 306, 313 (5th Cir. 1981) (same). However, separate counts based on multiple answers to a rephrased question would be multiplicious. *See Id.* at 313. In this record each of the substantive obstruction counts cites a separate instance of false testimony, requiring different factual proof of falsity. *See* fn. 3 *supra*. Therefore, the obstruction counts are not multiplicious.

IV. NIX AND HALAT

A. Count 1 – RICO

Count 1 alleges the following: Nix, Cook, Halat, Holcomb, Sharpe (unindicted), and others known and unknown constituted an enterprise, a group of individuals associated in fact which engaged in various criminal activities affecting interstate and foreign commerce, including 18 U.S.C. § 1343 (wire fraud), 18 U.S.C. § 1503

(obstruction of justice), 18 U.S.C. § 1512 (obstruction of justice), 18 U.S.C. § 1952(a) (interstate travel in aid of racketeering), 18 U.S.C. § 1956(a)(1)(A)(i) (money laundering), 21 U.S.C. § 841(a) (drug trafficking), 21 U.S.C. § 846 (conspiracy to traffic drugs), Miss. Code Ann. § 97-3-19 (1972), and Miss. Code Ann. § 97-1-1 (1972). The purposes of the enterprise included enriching the members and associates of the enterprise and generating funds for procuring Nix's release from prison. These defendants conspired to violate 18 U.S.C. § 1962(c) by conducting and participating, directly and indirectly, in the conduct of the affairs of the enterprise, through a pattern of racketeering activities. The pattern of racketeering activity includes the following acts: the Sherry murder conspiracy and murders; the pre-*Sharpe I* homosexual scam; the drug conspiracy; obstruction of justice; and the post-*Sharpe I* homosexual scam.

Nix and Halat moved to dismiss Count 1 as duplicitous, asserting that it alleged multiple conspiracies rather than one RICO conspiracy. An indictment is duplicitous if "it joins in a single count two or more distinct offenses." *United States v. Baytank*, 934 F.2d 599, 608 (5th Cir. 1991). We review such claims de novo. *See United States v. Trammell*, 133 F.3d 1343, 1354 (10th Cir. 1998). We assess the indictment to determine whether it can be read to charge only one violation in each count. *See United States v. Mastelotto*, 717 F.2d 1238, 1244 (9th Cir. 1983). The government can not "combine totally unrelated agreements and overt acts in a single RICO conspiracy." *See United States v. Sutherland*, 656 F.2d 1181, 1194 (5th Cir. 1981). However, if there is a single "agreement on an overall objective," multiple conspiracies may be

tried as a single enterprise conspiracy under RICO. *Id.* at 1192-93. This indictment alleges enriching the members and associates of the enterprise and generating funds for procuring Nix's release from prison as overall objectives of the conspiracy. It also alleges that conspiring to kill and killing the Sherrys, the pre-*Sharpe I* homosexual scam, the drug conspiracy, obstruction of justice, and the post-*Sharpe I* homosexual scam promoted these overall objectives. Therefore, Count One can be read to allege only one violation.

Alternatively, Nix and Halat assert that even if the indictment can be read to allege only one violation, the government proved multiple conspiracies at trial, creating a fatal variance from the one conspiracy alleged in the indictment. "A variance results when the charging terms of the indictment remain unaltered, but the evidence at trial proves facts other than those alleged in the indictment." *United States v. Ramirez*, 145 F.3d 345, 351 (5th Cir. 1998). A reversal based on variance between the indictment and proof requires two findings: (1) that the trial evidence actually proved multiple conspiracies, and (2) that the variance affected a substantial right of the appellant. *See United States v. Franklin*, 148 F.3d 451, 459 (5th Cir. 1998). Assuming without deciding that the trial evidence proved multiple conspiracies, neither defendant proved in this record that any such variance affected a substantial right.

B. Count 51

Count 51 alleges the following: Beginning in 1985 and continuing until October 26, 1996, the date of the

indictment, Nix and Halat conspired to devise a scheme to defraud by means of wire (telephone and telegraph) in violation of 18 U.S.C. § 1343. Nix and his confederates advertised in periodicals soliciting help, fraudulently claiming they needed financial help to relocate, travel, and for other expenses. Then they called the respondents and had them wire funds, either through Western Union or by wire transfer. The indictment specifically references 66 wire transfers covering the periods from January 1, 1986 to April 30, 1986 and from September 15, 1988 to September 22, 1988. The funds were delivered to Halat and others, for the use and benefit of Nix and the enterprise. Halat and others maintained and disbursed the funds as Nix directed. Overt acts included homosexual scam activity in 1986 and 1988, money laundering activities,[8] homosexual scam activity in 1986 and 1992, homosexual scam activity in 1985 and 1989.

Nix and Halat unsuccessfully moved to dismiss Count 51 as duplicitous, asserting that the count alleged two separate conspiracies rather than one conspiracy. We affirm because the evidence clearly shows that wire fraud conspiracy charged in count 51 did not end with Nix's conviction; rather, the evidence supports a single, ongoing conspiracy.

V. NIX, HOLCOMB, AND HALAT

Nix, Holcomb, and Halat argue that the statute of limitations expired before return of the indictment on

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[8] The district court dismissed the money laundering charges as not supported by any evidence.

October 22, 1996 on Count 1 RICO conspiracy and/or Count 50 and 51 wire fraud conspiracy. The limitations period for RICO offenses is five years which begins running upon the accomplishment or abandonment of the objectives of the conspiracy. *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983). Nix and Halat argue that the government declared the conspiracy over in *Sharpe I* in May 1996. Nix contends that the only acts after *Sharpe I* were concealment, which are not part of the conspiracy. Holcomb suggests that the only acts occurring within the prescription period were the acts of concealment and an allegedly threatening letter written by Cook (another co-conspirator) to Swetman (a witness). However, he contends, none of these acts were done in furtherance of the conspiracy and thus the statute of limitations was not tolled.

We review limitations challenges for the sufficiency of the evidence to support them because the scope of the conspiracy and membership in it are questions of fact for the jury. We review a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the verdict. We affirm if a rational trier of fact could have found all essential elements beyond a reasonable doubt. *Sultan*, 115 F.3d at 324. However, the plain error standard applies to Nix's and Halat's limitations claims because they were not raised before trial. *United States v. Mulderig*, 120 F.3d 534, 540 (5th Cir. 1997).

On this record we find that there was sufficient evidence to find that the defendants were involved in ongoing crimes that tolled the limitations period. The conspiracy was still in existence in 1992 when Nix and another prisoner received money from the new and

already existing homosexual scam victims. Holcomb offered to assist Gillich during his *Sharpe I* difficulties, showing that he was still willing to assist in the larger RICO and obstruction of justice conspiracies. The acts done to conceal the completed crimes were part of the conspiracy and thus tolled the limitations period. Halat's acts of concealment, such as committing perjury, clearly were acts done in furtherance of the main criminal objectives of the conspiracies.

VI. THOMAS LESLIE HOLCOMB

A. Evidentiary Errors

We review admission and exclusion of evidence for abuse of discretion. *See United States v. Skipper*, 74 F.3d 608, 612 (5th Cir. 1996). "[E]ven if we find an abuse of discretion in the admission or exclusion of evidence, we review the error under the harmless error doctrine." *Id.* Evidentiary rulings must be affirmed unless they affect the complaining party's substantial rights. *See id.* Holcomb argues that, considered as a whole, the district court's evidentiary errors warrant a new trial. *See United States v. Riddle*, 103 F.3d 423, 434-35 (5th Cir. 1997) (cumulative effect of evidentiary errors warranted a new trial).

First, Holcomb maintains that the trial court erred by excluding the testimony of Bobby Joe Faubion ("Faubion"). Holcomb argues that Faubion's testimony would have supported his claim that John Ransom committed the murders. The proffered testimony was: (1) Faubion had a phone conversation with Ransom; (2) Ransom told Faubion that Halat and Nix approached him about killing

a judge; (3) Ransom did not mention Holcomb's name; and (4) Faubion did not hear Holcomb's name in conversations with Nix and others.

Fed R. Evid. 403 provides that "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." Holcomb offers nothing to rebut the district court's finding that the proffered testimony's prejudice to the other defendants substantially outweighed its probative value. Holcomb was able to use other evidence to advance his "other gunman" defense. Accordingly, we conclude that the district court did not abuse its discretion by excluding Faubion's testimony. We thus need not address the court's other reasons for excluding the testimony.

Second, Holcomb contends that the district court erred by refusing to admit letters of recommendation written by the Government on behalf of Bill Rhodes ("Rhodes"). The district court did not refuse to admit the letters but, rather, reserved its ruling on their admissibility. Assuming the letters were admissible, Holcomb invited error by failing to renew his offer of proof at trial.

Third, Holcomb argues the district court erred by refusing to admit exculpatory FBI lab reports relating to hair, fiber, blood, and print analysis done by FBI lab examiners. Arguing that the reports were admissible under Fed.R.Evid. 803(8), the public records exception to the hearsay rule, Holcomb contends that the reports showed that he was not a match with the samples taken

from the crime scene.[9] Holcomb's reliance on the public records exception is misplaced. Rule 803(8)(B) excludes "matters observed by police officers and other law enforcement personnel" in criminal cases. Further, the district court permitted Holcomb to publish the contents of the reports to the jury. Thus, Holcomb has not shown that he was prejudiced by the exclusion of the reports themselves.

Fourth, Holcomb argues Brett Robertson's ("Robertson") in-court identification was too suggestive because of a newspaper article and photo Robertson got from his mother. After seeing the newspaper photo, Robertson advised the government that the photo of Holcomb in the newspaper was the same person he saw driving a Ford on September 14, 1987, the night of the Sherry murder. Holcomb argues that a conviction based in part upon an eyewitness' photographic identification may be set aside if the procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *United States v. Fletcher*, 121 F.3d 187, 194 (5th Cir. 1997). However, *Fletcher* is inapplicable because it involved the issue of a photographic line up prepared by police. In contrast, Robertson's encounter with Holcomb's photograph was unplanned and unexpected, and thus did not give rise to a due process challenge. *United States v. Seader*, 440 F.2d 547, 550 (5th Cir. 1971). Holcomb also contends that the district court should have permitted him to employ an expert witness to challenge Robertson's testimony. However, Holcomb has not shown

---

[9] At trial, Holcomb relied on the Fed.R.Evid. 803(6), the business records exception.

that the court was obligated to grant the defendant assistance of an expert under these circumstances. *United States v. Williams*, 998 F.2d 258, 263 (5th Cir. 1993)

Fifth, Holcomb argues that the trial court erred by permitting Baylis, Putnam, Denike, and Osborne to testify about Holcomb's other crimes and bad acts. *See* Fed. R. Evid. 404(b). We review alleged Rule 404(b) violations under the two-pronged test of *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978). To be admissible, (1) the extrinsic evidence must be relevant to an issue other than the defendant's character and (2) the probative value of the evidence may not be substantially outweighed by undue prejudice. *See id.*; Fed. R. Evid. 403 (stating that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice"). Regarding the second prong, the district court made the requisite Rule 403 determination. We consider the first prong in greater detail.

Baylis and Putnam were inmates who testified that Holcomb admitted to them that he killed the Sherrys. The district court allowed Baylis and Putnam to testify that Holcomb also admitted to being arrested in Florida and shooting a "snitch" in Texas. Baylis also testified that he knew Holcomb in the 1970's when Holcomb was allegedly involved in stealing weapons. The district court permitted Officer Denike to confirm the details of Holcomb's Florida arrest. Holcomb argues that allowing Baylis, Putnam, and Officer Denike to testify about crimes and bad acts that were not related to the Sherry murders was error because "[e]vidence of other crimes, wrong, or acts is not admissible to prove the character of

a person in order to show action in conformity therewith." *Id.* The problem with Holcomb's argument is that the testimony about his other crimes and bad acts was not offered to prove that Holcomb acted in conformity with his bad character. *See id.* (stating that "[e]vidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."). Instead, the evidence was offered to show that Baylis and Putnam had information that they could only have learned from Holcomb, corroborating their claim that Holcomb confessed to killing the Sherrys. *See United States v. McCarty*, 36 F.3d 1349, 1353-55 (5th Cir. 1994) (holding that admitting extrinsic evidence to corroborate the defendant's confession to a cellmate was not reversible error). The district court did not abuse its discretion by admitting this evidence.

Similarly, Holcomb contends that Officer Osborne's testimony constituted impermissible extrinsic character evidence. Officer Osborne, a Texas law enforcement official, testified that he found a .22 caliber pistol and a drawing of a silencer during a search of Holcomb's home in 1988. The pistol was not the same one used in the Sherry murders. The district court did not abuse its discretion by admitting this evidence because it was admitted to show intent, motive, knowledge, opportunity, and method of operation. *See* Fed. R. Evid. 404(b).

Finally, Holcomb asserts that the district court erred by admitting double hearsay. Gillich testified about the conspiracy in which he, Cook, Holcomb, and others participated. He testified that, the day after the murders, Cook called Holcomb to ask about the hit. Gillich testified

that Holcomb confirmed murdering the Sherrys. The district court correctly admitted the testimony because both Holcomb's statements to Cook and Cook's statements to Gillich were admissible as statements of co-conspirators made in furtherance of the conspiracy. *See* Fed. R. Evid. 801(d)(2)(E); *see United States v. Gironda*, 758 F.2d 1201, 1216-19 (5th Cir. 1985) (concluding that the district did not err by permitting a co-conspirator to testify that another conspirator had told him about a threatening phone call he received from the defendant).

B. Sufficiency of the Evidence to Convict Holcomb

Holcomb contends that the evidence was insufficient to convict him on Count 1 and Count 50 because the government did not prove that he had knowledge of the objectives of the overall conspiracy. He says the government's theory assumes he committed the murders but has nothing to do with the homosexual scams, wire fraud, mail fraud, money laundering, and other activities. We review the evidence in the light most favorable to the verdict. We affirm if a rational trier of fact could have found all essential elements of the crime beyond a reasonable doubt. *Sultan*, 115 F.3d at 324.

To prove a RICO conspiracy the government must establish (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense. *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998). The evidence was sufficient to convict Holcomb of the RICO conspiracy. First, Holcomb agreed with the objective by killing Vincent Sherry. Second,

Holcomb agreed to commit violence and threats of violence to protect the enterprise. To prove obstruction of justice the government must show an intent to endeavor to impede the due administration of justice. *United States v. Williams*, 874 F.2d 968, 976-82 (5th Cir. 1989). Here again the evidence was sufficient to convict Holcomb of this crime. Holcomb threatened Swetman to keep him from cooperating with the government.

VII. HALAT

A. Duplicity

Halat contends that Count 16 of the indictment is duplicitous and that the district court erred in failing to give a unanimity instruction to the jury regarding this Count. Count 16 alleged that Halat violated 18 U.S.C. § 1503 by obstructing justice when he testified falsely in *Sharpe I*. The indictment included the following excerpt of the testimony involved:

> Question: At some point in time, did you come to learn whether or not there was a scam, homosexual scam operating out of Angola in which Kirksey Nix was involved?
>
> Halat: I came to find out that there was activity going on at Angola prison that Kirksey Nix was alleged to be involved in.
>
> Question: When did that happen?
>
> Halat: May of 1988
>
> * * *

Question: As of that date or as of the time you received the information from the F.B.I., whatever date that was prior to May 13th, 1988, what knowledge did you have of your office being used, as a depositor of scam funds?

Halat: I don't believe my office was being used as a depository of scam funds.

Halat argues that Count 16 is duplicitous because it alleged two separate and distinct answers to two different questions each of which could support a separate conviction for obstruction of justice. Halat also contends that the district court erred in failing to instruct the jury that it must unanimously find that Halat lied regarding a particular answer.

Halat moved to dismiss the indictment before trial on the grounds that it was duplicitous, but did not request a unanimity instruction or object when the district court did not give one. "An indictment may be duplicitous if it joins in a single Count two or more distinct offenses." *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 608 (5th Cir. 1991). We have previously held that the government may include several acts within a single Count where those actions represent a single, continuing scheme provided:

> the indictment (1) notifies the defendant adequately of the charges against him; (2) does not subject to [sic] the defendant to double jeopardy; (3) does not permit prejudicial evidentiary rulings at trial; and (4) does not allow the defendants to be convicted by a nonunanimous verdict.

United States v. Fisher, 106 F.3d 622, 632 (5th Cir. 1997) (internal quotations omitted). However, if an indictment is duplicitous and the defendant is prejudiced, then the conviction may be subject to reversal. *See id.*

Halat does not argue that he was prejudiced in any way by the inclusion of the two acts in Count 16. Additionally, the circumstances involved in Count 16 satisfy many of the criteria specified above. The government proved and the district court actually instructed the jury that the issue was not whether the particular responses, considered individually and out of context, were made intentionally with knowledge of falsity, but rather, whether Halat's responses were made as part of an endeavor to impede and block the flow of truthful information, in other words, a single continuous scheme. The indictment also adequately notified Halat of the charges against him and does not create a danger of double jeopardy because it specifically includes the statements on which the government relied in prosecuting Halat for obstruction of justice. Regarding the risk of a non-unanimous jury verdict, the district court did not give the jury an [sic] unanimity instruction concerning Count 16 specifically, and Halat did not object or request that such an instruction be given; therefore, we review the district court's decision for plain error. *See United States v. Yamin*, 868 F.2d 130, 132 (5th Cir. 1989). Again, Halat does not argue that he was prejudiced by the district court's failure to give a unanimity instruction. For these reasons, Halat's arguments fail.

B. Ex Post Facto and Sentencing

Halat also argues that his ten year sentence for obstruction of justice violates the Ex Post Facto Clause of the Constitution because at the time he engaged in the prohibited conduct, the sentence for obstruction of justice was only five years, rather than ten. We need not address this argument because Halat waived his right to appeal his sentence in exchange for the government's agreement not to appeal a sentence imposed below the guideline range. *See United States v. Dees*, 125 F.3d 261, 269 (5th Cir. 1997); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992) ("We hold that a defendant may . . . waive his statutory right to appeal his sentence."). Halat does not contend that his waiver was not informed and voluntary. *See id.*

C. Deliberate Ignorance Instruction

Nix and Halat complain that the district court mistakenly instructed the jury that the defendants acted "knowingly" if they "deliberately closed [their] eyes to what otherwise would have been obvious." First, they contend that there was no evidence to support the instruction. This Circuit has established a two-part test to determine when a deliberate ignorance instruction is warranted. "The evidence must show that: (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct." *United States v. Faulkner*, 17 F.3d 745, 766 (5th Cir. 1994). Halat argues that the government did not show that he knew of the conspiracies, that he was subjectively aware

of a high probability of illegal conduct, or that he sought to avoid learning of the illegal conduct. Second, both defendants contend that the court erred in not limiting the deliberate ignorance instruction because the instruction was inconsistent with the essential elements of the conspiracy. They urge us to adopt Second Circuit authority holding that it is an error to give a deliberate ignorance instruction in relation to the issue of knowing participation in a conspiracy. *United States v. Fletcher*, 928 F.2d 495, 502-503 (2nd Cir. 1991).

The standard of review applied to a defendant's claim that a jury instruction was inappropriate is "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of the law applicable to the factual issues confronting them." *United States v. August*, 835 F.2d 76, 77 (5th Cir. 1987). The district court "may not instruct the jury on a charge that is not supported by the evidence." *United States v. Ortega*, 859 F.2d 327, 330 (5th Cir. 1988). Further, in determining whether the evidence reasonably supports the charge, the evidence and all reasonable inferences that may be drawn from it are viewed in the light most favorable to the government. *United States v. Lara-Velasquez*, 919 F.2d 946, 950 (5th Cir. 1990).

We find that there was sufficient evidence to support a deliberate ignorance instruction. Halat knew the high probability of illegal conduct, and he purposely contrived to avoid learning it. Halat managed the thousands of dollars that Nix's operation generated, and he gave Sharpe, Nix's girlfriend, free run of his office. Halat also met and spoke with those planning the Sherrys' murders. Regarding the claim that the instruction was not proper

in a conspiracy we note that this Circuit has consistently approved a deliberate ignorance instruction in such cases. *See, e.g., United States v. Scott*, 159 F.3d 916, 924 n.6 (5th Cir. 1998) (citing six different conspiracy cases in which the court has used a deliberate ignorance instruction and noting that the court has consistently held the deliberate ignorance instruction proper when supported by sufficient evidence).

D. Presentation of False Testimony

Halat and Nix contend that the government knowingly presented perjured testimony. Specifically, at the 1996 trial, witness Rhodes repeated his *Sharpe I* testimony that he was contacted by Ransom to kill the Sherrys and that Ransom told him he had carried out the contract killing. Gillich, on the other hand, testified that he contracted with Holcomb to kill the Sherrys, and that he did not know Rhodes or Ransom.

They also contend that the government violated their due process rights by changing its theory of the crime after the 1991 trial. In *Sharpe I*, the government maintained that Rhodes' testimony alone was sufficient direct evidence of the involvement of Ransom, Gillich and Halat in the murders. This theory is inconsistent with the government's present reliance on Gillich's testimony that Holcomb, and not Ransom, was the trigger man. Nix and Halat argue that this "flip-flopping" of theories violates the bedrock principles of due process.

As to the government knowingly presenting false testimony, reversal is required if it is shown that: (1) the testimony was false; (2) the testimony was material to the

verdict; and (3) the prosecutor knew or believed the testimony to be false. *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993). They contend that, because the testimony of Ransom and Gillich was false, material and the government knew it, their due process rights were violated. As to the change in government theories, the defendants contend that due process rights are violated when a prosecutor presents two different and inconsistent theories of the same crime in two different trials. *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc), *rev'd* on other grounds, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998); *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985).

Review of an allegation of the use of false evidence requires "an independent analysis to determine whether the facts found by the trial court rise to the level of the applicable legal standard." *United States v. O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1998). We find the defendants' due process claims to be without merit. First the defendants were well aware of the contradictory testimony during the trial. *United States v. Blackburn*, 9 F.3d 893, 894 (5th Cir. 1993) (noting that courts have been reluctant to find a deprivation of due process when the prosecution has provided the defense with the necessary information and it can utilize the information). Furthermore, the trial court on several occasions instructed the jurors that it was their job to weigh the credibility of witnesses, and that they could accept or reject witness's testimony.

Regarding the defendants' contention that the government changed its theory, we view the government's presentation of the evidence not as a due process violation but merely as the presentation of new and significant

evidence that justified the prosecution in question. The very case the defendants cite recognizes that there is no due process violation when "new significant evidence comes to light" that justifies a subsequent prosecution. *Thompson*, 120 F.3d at 1058.

E. Whether Nix was properly sentenced to life imprisonment

Nix contends that he was sentenced to life imprisonment based on the district court's finding of facts concerning the Counts 1 and 2 Racketeering Acts. Nix argues that the jury did not make specific unanimous findings regarding underlying racketeering activities in convicting him, and that the district court usurped the role of the jury in making these specific findings. Thus, his right to be found guilty beyond a reasonable doubt by a jury for the underlying activities was negated. He requests that the court remand for consideration of his sentence based on the base level offense for racketeering, which is United States Sentencing Guideline ("U.S.S.G.") 2E1.1(a)(2).

This Court reviews a district court's application of the Sentencing Guidelines de novo and the district court's factual findings for clear error. *United States v. Dixon*, 132 F.3d 192, 201 (5th Cir. 1997). We find that the district court properly sentenced Nix. Nix was found guilty of RICO conspiracy Counts 1 and 2 in violation of 18 U.S.C. § 1962. Both RICO Counts included Racketeering Acts A (conspiracy to commit murder and murder) and B (murder) in violation of the laws of Mississippi. The applicable sentencing guideline, U.S.S.G. 2D1.1 provides that the

base level is the greater of 19 or the "offense level applicable to the underlying racketeering activity." Here, the underlying activity involved violations of Mississippi murder statutes, and the district court properly analogized this offense to the federal first degree murder offense during sentencing.

CONCLUSION

For the foregoing reasons, we affirm the convictions and sentences of all appellants.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-60263

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

SHERI LARA SHARPE

Defendant – Appellant.

* * *

No. 97-60704

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

SHERI LARA SHARPE; THOMAS LESLIE HOLCOMB; PETER HALAT, JR; KIRKSEY MCCORD NIX, JR, also known as J R, also known as Junior, also known as Kirk

Defendants – Appellants

Appeals from the United States District Court
for the Southern District of Mississippi, Hattiesburg

ON PETITIONS FOR REHEARING

(Filed Dec. 14, 1999)

Before POLITZ, JOLLY and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing on behalf of Thomas Leslie Holcomb and Peter Halat Jr filed in the above case are DENIED

ENTERED FOR THE COURT:

/s/ JOHN M. DUHÉ, JR
United States Circuit Judge

REHG-13

Supreme Court, U.S.
FILED
MAY 12 2000

(2)

No. 99-1511

In the Supreme Court of the United States

PETER HALAT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the district court properly instructed the jury that it could infer knowledge from deliberate ignorance.

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In the Supreme Court of the United States

No. 99-1511

PETER HALAT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 193 F.3d 852.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1999. A petition for rehearing was denied on December 14, 1999 (Pet. App. 35b-36b). The petition for a writ of certiorari was filed on March 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of conspiring to violate the racketeering statute, in violation of 18 U.S.C. 1962(c); obstruction of justice, in violation of 18 U.S.C. 1503; conspiring to obstruct justice, in violation of 18 U.S.C. 371; and conspiracy to commit wire fraud, in violation of 18 U.S.C. 371.[1] He was sentenced to 216 months' imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-34a.

1. Petitioner's convictions arose from his involvement in the prison-based criminal activities of Kirksey McCord Nix and the murders of Vincent and Margaret Sherry. Those events resulted in the 1991 convictions of Nix and Sheri LaRa Sharpe for fraud, conspiracy to commit murder-for-hire, and related offenses. See *United States* v. *Sharpe*, 995 F.2d 49 (5th Cir.), cert. denied, 510 U.S. 885 (1993). Following the 1991 trial, new facts came to light implicating petitioner and Thomas Holcomb in those matters. As a result of the new information, a grand jury issued a 52-count indictment against petitioner, Nix, Holcomb, and Sharpe. Following a new trial, Nix and Sharpe were again

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[1] Petitioner was acquitted of violating the racketeering statute and four counts of obstruction of justice; one obstruction of justice count was dismissed. Co-conspirator Kirksey McCord Nix, Jr. was convicted of RICO conspiracy, substantive RICO, conspiracy to escape from federal custody, money laundering, wire fraud, conspiracy to obstruct justice, and conspiracy to commit wire fraud; co-conspirator Sheri LaRa Sharpe was convicted of obstruction of justice and conspiracy to obstruct justice; and co-conspirator Thomas Leslie Holcomb was convicted of RICO conspiracy and conspiracy to obstruct justice.

convicted, and petitioner and Holcomb were also convicted for their respective roles in the affairs. Pet. App. 2a.

a. While serving a life sentence for murder at Angola State Penitentiary in Louisiana, Nix built a criminal empire from which he hoped to earn enough money to buy his way out of prison. Although the enterprise generated some money from insurance fraud and drug dealing, its primary money-making scheme was a scam designed to defraud homosexual men. Nix and his prison syndicate would place personal advertisements in national homosexual magazines, and, when men would respond to them, Nix or one of his associates would indicate that he was having financial difficulties and request the respondent to wire money to a Nix associate outside prison. Nix took in hundreds of thousands of dollars from this scam. Pet. App. 2a-3a; Gov't C.A. Br. 8-10.

Mike Gillich, the alleged "underworld boss" of Biloxi, Mississippi, aided Nix in his various schemes. Petitioner, a Biloxi attorney, who was aware of Nix's scam, maintained a trust account for Nix. Although Nix had no known means of generating money, petitioner allowed Nix to run thousands of dollars through this trust account. Moreover, bank statements for Nix's main bank account at the State National Bank of Eufaula, in Oklahoma, were sent to petitioner's office. On one occasion, while driving to see Nix at Angola, petitioner explained to Gillich that Nix was making a lot of money through the scam, and petitioner later showed Gillich the bank statement. Although petitioner claimed Nix was a client, petitioner never filed any pleadings or performed any legal services for Nix, and never billed him for any services. Pet. App. 3a; Gov't C.A. Br. 10a-12a & n.14.

Nix's girlfriend, LaRa Sharpe, also assisted in the schemes. Although she was not an employee of petitioner's firm, petitioner gave her complete run of his office. Sharpe and petitioner rented a safety deposit box, to which only they had access, in which they kept cash generated by Nix's operations. Moreover, petitioner submitted numerous affidavits to the Angola Prison, in which he falsely swore that Sharpe was a paralegal employed by him, and in which he gave her "attorney-client" privileges to visit Nix and his associates. Pet. App. 3a; Gov't C.A. Br. 11-12.

In December 1986, while petitioner and Gillich drove to Angola State Penitentiary to visit Nix, petitioner told Gillich that approximately $100,000 of Nix's "buy-out" money was missing. Petitioner voiced his suspicion that Vincent Sherry, petitioner's former law partner and a Mississippi Circuit Judge, had stolen the money. Coincidentally, Judge Sherry's wife, Margaret, was a Biloxi mayoral candidate critical of Gillich's operations. In February 1987, petitioner told Gillich that he would like to run for mayor, because that was how "you could make money," but that he could not because of Vincent Sherry's wife. Pet. App. 3a; Gov't C.A. Br. 13-14.

b. In mid-1987, Nix and Gillich agreed to split the cost of having Vincent Sherry killed. They considered as possible hit men ex-convict John Ransom and Robert Hallal, but ultimately selected Thomas Holcomb to perform the murder for $20,000. In early September 1987, petitioner asked Gillich how things were progressing, and Gillich replied that the hit was "on." Petitioner offered to pay half, and Gillich told him that it had been taken care of. Petitioner also expressed concern that the killer might mistake him for Vincent Sherry. Gillich told him not to worry. A few days later,

petitioner told Gillich that the Sherry children would not be at the Sherry house since they all lived elsewhere. Gov't C.A. Br. 15-16.

Holcomb shot and killed the Sherrys in their home on the evening of September 14, 1987. When Judge Sherry did not appear in court on September 16, calls were placed to petitioner's office for assistance in locating him. Petitioner and a firm associate drove to the Sherry house. There, after the two men had searched outside the house for several minutes, the associate noticed that the door was unlocked, and called petitioner over. Petitioner pushed past the associate a few steps into the house, and immediately exited, announcing that both Vincent and Margaret Sherry were dead. Petitioner, however, had not had time to reach the back of the house where Margaret's body was located. Although the time of the deaths was a closely held investigative fact, petitioner, overhearing investigators mention that a woman had claimed to have talked to the Sherrys on Tuesday, blurted out that this was not possible since the Sherrys had been killed on Monday. A few days after the murders, petitioner asked Gillich whether he needed to worry about anything; Gillich stated that petitioner was not in danger. Gov't C.A. Br. 17-19.

Thereafter, petitioner brought Gillich some documents reflecting the scam, stating that the police would be going through his office. Nix told Gillich to destroy the papers. One year later, petitioner brought more Nix-related records to Gillich to be disposed of, explaining: "Looks like, you know, it's going to be investigated." In the fall of 1989, a few days before petitioner —by then Mayor of Biloxi—was publicly linked in news reports to the Sherry murders, petitioner's office manager retrieved the Nix file from petitioner's office,

telling an office associate that she had to take the Nix file over to "Pete" at City Hall. Gov't C.A. Br. 20-21.[2]

2. In its general charge to the jury, before instructing on the elements of the offenses charged, the court instructed:

> Now, the word "knowingly," as the term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.
>
> You may find that a defendant had knowledge of a fact if you find that defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of a defendant cannot be established merely by demonstrating that the defendant was negligent, careless or foolish,

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[2] At the first trial in 1991 for fraud and the Sherry murders, the government argued that Nix hired Ransom to kill the Sherrys. Bill Rhodes, an associate of Ransom, testified that Ransom had murdered the Sherrys, and Gillich testified that petitioner was not involved with the homosexual scam or with the murders. As a result, the government elected not to prosecute petitioner. The jury convicted Nix, Gillich, Sharpe, and Ransom of wire fraud and conspiracy to commit wire fraud. The jury also found Nix and Gillich guilty of travel in aid of murder-for-hire. Pet. App. 3a-4a.

Following the trial, the government continued its investigation into the scam and murders, concentrating its efforts on determining what role petitioner played in the crimes. In 1994, Gillich agreed to cooperate in return for a reduction in his sentence and admitted that petitioner was involved in the scams and the murders. Gillich further indicated that it was not Ransom who had murdered the Sherrys, but rather Holcomb. As a result of its further investigation and Gillich's testimony, the government in 1996 brought a new indictment against Nix, Sharpe, petitioner, and Holcomb. Pet. App. 4a.

> knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

Tr. 5304 (Fifth Circuit Pattern Jury Instruction 1.35). Thereafter, in instructing the jury on the elements of RICO conspiracy, the court charged that the government was required to prove that "a conspiracy or agreement * * * existed between two or more persons to participate in the affairs of an enterprise that affected interstate commerce through a pattern of racketeering activity;" that "the defendant * * * deliberately joined or became a member of the conspiracy or agreement with knowledge of its purposes;" and that the defendant "willfully and knowingly conspired with at least one other person by agreeing that someone, not necessarily that defendant, would commit at least two of the racketeering acts detailed in Count 1 of the indictment." Tr. 5306-5307. See also Tr. 5310 ("The defendant that you're considering must have deliberately agreed to become a member of that agreement" and must have "deliberately and willfully becom[e] a part of the conspiracy."). The court further instructed that "[i]f a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him of conspiracy even though that defendant had not participated before and even though that defendant played only a minor role." Tr. 5308. The court cautioned, however, that "the mere fact that certain persons have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy," and that "a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a

conspiracy, does not thereby become a conspirator." Tr. 5308-5309. The court gave similar instructions as to the wire fraud conspiracy. See Tr. 5325, 5330 ("[B]efore a defendant may be held criminally responsible for the acts of others, it is necessary that the particular defendant being considered deliberately associate himself in some way with the crime and * * * participate in it with the intent to bring about the crime.").

After instructing the jury, the court invited counsel to object to any aspect of the charge or to request further instructions. Tr. 5338-5341. Petitioner's counsel objected to the deliberate ignorance instruction on the following ground: "I understand the Court's ruling that they believe it's appropriate on the facts of this case. We believe it wasn't part of the proof of the government." Tr. 5341. The court overruled the objection, explaining that specific testimony supported the charge, such as the enormous number of telephone calls made from petitioner's office to Nix, Sharpe's presence in petitioner's office, and Nix's status as an inmate at Angola prison, which prevented him from generating any legal income. "[T]his is the classic case of where a closing-your-eyes-deliberately-closing your eyes instruction should be given." Tr. 5342.

3. The court of appeals affirmed. Pet. App. 1a-34a. The court rejected petitioner's claim that there was no evidence to support the giving of a deliberate ignorance instruction. The court found that the evidence showed that petitioner "knew the high probability of illegal conduct, and he purposely contrived to avoid learning it." Thus, petitioner "managed the thousands of dollars that Nix's operation generated, and he gave Sharpe, Nix's girlfriend, free run of his office." Further, petitioner "met and spoke with those planning the Sherrys' murders." *Id.* at 30a.

The court also rejected petitioner's contention—raised for the first time on appeal—that the district court "erred in not limiting the deliberate ignorance instruction because the instruction was inconsistent with the essential elements of the conspiracy." The court declined petitioner's request that it adopt the rule that a deliberate ignorance instruction may not be given in relation to the issue of knowing participation in a conspiracy. Citing *United States* v. *Scott*, 159 F.3d 916, 924 n.6 (5th Cir. 1998), the court noted that it had consistently approved the giving of a deliberate ignorance instruction in conspiracy cases when the instruction was supported by sufficient evidence. Pet. App. 30a-31a.[3]

ARGUMENT

Petitioner contends (Pet. 12-21) that it was error for the district court to give a "deliberate ignorance" instruction[4] in relation to any of the three conspiracy

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[3] The court also rejected petitioner's claim that the RICO conspiracy and obstruction of justice charges were duplicitous; that the proof established multiple conspiracies; that the RICO and wire fraud conspiracy charges were barred by the statute of limitations; that the district court erred in failing to give a unanimity instruction as to the obstruction of justice count; that his ten-year sentence for obstruction of justice violated the Ex Post Facto Clause of the Constitution; and that the government knowingly presented perjured testimony. Petitioner does not renew any of these claims in this Court.

[4] Courts refer to a group of somewhat similar instructions as "deliberate ignorance" and "conscious avoidance" instructions. The specific instructions may differ from one another in important respects. Nonetheless, nothing in the analysis in this case turns on the differences between specific instructions given in individual cases. Accordingly, we use the terms "deliberate ignorance" and "conscious avoidance" interchangeably in this brief.

offenses that were charged in this case. He contends that the decision below upholding the use of the instruction in this case conflicts with decisions of the Second Circuit holding that it is error to give a deliberate ignorance instruction in relation to the issue of a defendant's knowing participation in a conspiracy.

1. Petitioner did not object to the deliberate ignorance instruction on the ground that such an instruction may not be given in a conspiracy case. He can therefore prevail on his claim only if it constituted plain error. See Fed. R. Crim. P. 30, 52(b); *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993). Under the plain error standard, an error does not warrant reversal unless it was "clear" or "obvious" and affected a defendant's substantial rights, *i.e.*, likely affected the outcome of the proceedings in the trial court. *Id.* at 732-734. Even then, a reviewing court need not correct the error unless it seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.* at 736. Petitioner has not established error in the charge, much less plain error. Indeed, even under the Second Circuit's standard, it was proper to give a deliberate ignorance charge in this case. In any event, because review in this case would be for plain error only, it would not present an appropriate vehicle to address any conflict between the Fifth and Second Circuits on the issue.

2. The deliberate ignorance instruction given in this case was appropriate. It permitted the jury to draw the inference that petitioner knew the relevant facts regarding the conspiracies with which he was charged if it found that petitioner acted in deliberate ignorance of those facts. The instruction told the jury that "[y]ou may find that a [petitioner] had knowledge of a fact if you find that [he] deliberately closed his eyes to what

would otherwise have been obvious to him." Tr. 5304. See also *ibid.* ("knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact"). It thus informed the jury of an inference it was permitted—but not required—to draw in determining whether petitioner had the requisite knowledge for conviction. Because a permissive inference "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof," it is invalid "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *County Court* v. *Allen*, 442 U.S. 140, 157 (1979).

Contrary to petitioner's assertion (Pet. 20), the deliberate ignorance instruction in this case also made clear that, although the jury was entitled to infer knowledge from circumstantial evidence that petitioner "deliberately blinded himself to the existence of a fact" (Tr. 5304), the jury ultimately had to find that petitioner had actual knowledge of the conspiracy before it could find him guilty. The instruction stated that "knowledge on the part of [petitioner] cannot be established merely by demonstrating that [petitioner] was negligent, careless or foolish." *Ibid.* The instruction thus informed the jury that, where a failure to inquire in the face of highly suspicious circumstances is present, it may—not must—draw an inference that the defendant had actual knowledge of the facts not investigated.

3. The court of appeals' decision in this case does not conflict with any decision of the Second Circuit. In a series of cases beginning with *United States* v. *Mankani*, 738 F.2d 538, 547 n.1 (1984), the Second Circuit has stated that, although "application of the 'conscious avoidance' theory is appropriate where the

essential mental element of the crime is 'guilty knowledge,'" it is inappropriate to prove membership in a conspiracy, where "the requisite mental state * * * is intent, not mere knowledge." Neither in *Mankani* nor in any other case, however, has the Second Circuit ever reversed a conspiracy conviction because a "conscious avoidance" or "deliberate ignorance" instruction was given. In *Mankani* itself, the court's comments came in the course of a discussion of the sufficiency of the evidence to convict the defendant of conspiracy. See 738 F.2d at 547. Although the court criticized the government's deliberate ignorance theory with respect to one aspect of the evidence that the defendant participated in the conspiracy, the opinion does not reflect that the jury was instructed on deliberate ignorance, and the court therefore did not address the precise effect of a particular deliberate ignorance instruction.

An examination of the Second Circuit's later cases indicates that that court would approve the instruction in the circumstances present in this case. In *United States* v. *Lanza*, 790 F.2d 1015, cert. denied, 479 U.S. 861 (1986), the Second Circuit noted that the passage from *Mankani* quoted above was "dicta," and the court "reject[ed] [the defendants'] argument that the conscious avoidance charge was inappropriate in this conspiracy case simply because the underlying substantive offense was not charged." 790 F.2d at 1022. The court explained that *Mankani* was concerned with use of the conscious avoidance instruction to substitute for proof of "knowing *participation or membership*" in the conspiracy. *Ibid.* (emphasis added). Conscious avoidance does not itself establish a defendant's agreement or participation in a conspiracy, because there is a difference between mere knowledge of a conspiracy's goals and agreement to join in achieving them. See

United States v. *Ciambrone*, 787 F.2d 799, 810 (2d Cir.) ("membership in a *conspiracy* cannot be proven by conscious avoidance"), cert. denied, 479 U.S. 1017 (1986). As the court recognized in *Lanza*, however, conscious avoidance may be used as a basis for inferring knowledge of the conspiracy's goals or objectives. See 790 F.2d at 1023 ("[A] conscious avoidance charge was appropriate vis-a-vis knowledge of the objectives of the scheme charged.").

In subsequent cases, the Second Circuit has adhered to that distinction. See *United States* v. *Eltayib*, 88 F.3d 157, 170 ("[C]onscious avoidance will not support a finding that a defendant knowingly participated in the conspiracy," but "conscious avoidance may support a finding with respect to the defendant's knowledge of the objectives or goals of the conspiracy."), cert. denied, 519 U.S. 1045 (1996); *United States* v. *Aulicino*, 44 F.3d 1102, 1115 (2d Cir. 1995) ("Where there is sufficient evidence that the defendant was a member of the conspiracy, a conscious-avoidance instruction may properly be given, permitting the jury to convict if it finds that the defendant deliberately attempted to remain ignorant of the conspiracy's precise goals."); *United States* v. *Fletcher*, 928 F.2d 495, 502 (2d Cir.) ("We have repeatedly held that a conscious avoidance charge is appropriate where the knowledge of the fraudulent goals of a conspiracy, as contrasted with knowing and intentional participation in the conspiracy, is at issue."), cert. denied, 502 U.S. 815 (1991); see also *United States* v. *Boothe*, 994 F.2d 63, 69 (2d Cir. 1993) (finding no error in giving conscious avoidance

instruction in case involving both conspiracy and substantive counts).[5]

In this case, the instruction at issue expressly concerned only proof of petitioner's knowledge of the unlawful aims and objectives of the conspiracy—not proof of his intent to participate in the conspiracy.[6] The in-

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[5] Petitioner cites (Pet. 17) *United States* v. *Scotti*, 47 F.3d 1237, 1243 (2d Cir. 1995). In that case, however, the court held that the conscious avoidance instruction was not given with respect to the conspiracy count. *Ibid.* ("Here, the knowledge at issue does not pertain to membership in a conspiracy, but participation in conduct proscribed by the substantive offense of [18 U.S.C.] 894(a)(1).").

[6] Petitioner mistakenly asserts (Pet. 18) that the First and Sixth Circuits have adopted the Second Circuit's reasoning that a deliberate ignorance instruction should not be given with respect to a conspiracy charge. Petitioner cites *United States* v. *Hurley*, 63 F.3d 1, 10 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996), and *United States* v. *Warshawsky*, 20 F.3d 204, 210-211 (6th Cir. 1994), for that proposition. In *Hurley*, however, in response to a claim that the trial court had improperly refused to instruct the jury that deliberate ignorance did not apply to the RICO conspiracy count, the First Circuit merely observed that the deliberate ignorance instruction "appears to have been aimed at the 'knowing' requirements of substantive counts." 63 F.3d at 10. With respect to the possibility that the instruction "diluted the express 'intent' requirement for the conspiracy count," the court noted that the instructions had "guarded against that risk with cautionary instructions stressing that the defendants must have joined the conspiracy intentionally." *Ibid.* See also *United States* v. *Brandon*, 17 F.3d 409, 453 n.75 (1st Cir.) (noting that a deliberate ignorance instruction can be permissible with respect to a conspiracy charge), cert. denied, 513 U.S. 820 (1994). In *Warshawsky*, the Sixth Circuit noted its prior approval of a deliberate ignorance instruction in a conspiracy case where the defendant had denied knowledge of any illegal activity. The court observed that the defendant would be entitled to no relief under the standard established in the Second Circuit, because the instruction "was offered to prove [the defendants'] *knowledge of the aims of the*

struction preceded the specific instructions on the conspiracy and substantive counts with which petitioner was charged, and it defined the term "knowingly" as used throughout the instructions. It did not suggest that deliberate ignorance could be used as a substitute for proof of the defendant's intent to participate in the conspiracy and achieve its goals. Later, during the instructions on the conspiracy offenses, the court made clear that the government had the burden of proving that petitioner "deliberately joined or became a member of the conspiracy or agreement with knowledge of its purposes," Tr. 5306; that he "deliberately agreed to become a member of the [conspiratorial] agreement" and "deliberately and willfully bec[ame] a part of the conspiracy," Tr. 5310; and that he "underst[ood] the unlawful nature of [the] plan or scheme and knowingly and intentionally join[ed] in that plan or scheme," Tr. 5308. Thus, the Second Circuit would find the instructions in this case appropriate.[7]

4. In any event, the courts of appeals agree that even if the district court erred in instructing the jury on deliberate ignorance, a conviction may be affirmed if

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conspiracy, not to prove *the existence of an agreement*." 20 F.3d at 210-211.

[7] Petitioner notes (Pet. 18) that the Seventh Circuit has stated that its position permitting use of a deliberate ignorance instruction in conspiracy cases is "contrary to the precedent in the Second Circuit." *United States* v. *Diaz*, 864 F.2d 544, 549 (7th Cir. 1988), cert. denied, 490 U.S. 1070 (1989). *Diaz*, however, was decided before the Second Circuit's decisions in *Eltayib*, *Aulicino*, and *Fletcher*, and the only Second Circuit decision cited in *Diaz* was *Mankani*. The Second Circuit's post-*Mankani* cases have clarified its position on this issue. For the reasons stated in text, the Second Circuit's current position on this issue appears to be consistent with the position of the Seventh Circuit.

the evidence was overwhelming with respect to the defendant's knowledge, so that a court can conclude that the error was harmless. See, *e.g.*, *United States* v. *Adeniji*, 31 F.3d 58, 63-64 (2d Cir. 1994); *United States* v. *Whittington*, 26 F.3d 456, 464 (4th Cir. 1994); *United States* v. *Boutte*, 13 F.3d 855, 859 (5th Cir.), cert. denied, 513 U.S. 815 (1994); *United States* v. *Barnhart*, 979 F.2d 647, 652-653 (8th Cir. 1992). Here, the evidence was overwhelming that petitioner actually knew of the illegal goals of the conspiracy. See pp. 3-5, *supra* (petitioner's statement to Gillich that Nix was making a lot of money through the homosexual scam; petitioner's personal access to a safety deposit box in which cash generated by Nix's operations was kept; petitioner's directions to Gillich to destroy documents reflecting the scam because there was going to be an investigation; petitioner's conversations with Gillich bearing on the planned murder of Vincent Sherry). Accordingly, any error in giving a deliberate ignorance instruction would have been harmless and certainly could not have risen to the level of plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

DEBORAH WATSON
Attorney

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